



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Adrian Supply Co.--Reconsideration; Western
States Electric, Inc.
File: B-227022.3; B-227022.4
Date: February 23, 1988

DIGEST

1. Dismissal of protest for failure to file a copy with the contracting agency within 1 working day after filing of protest with the General Accounting Office is affirmed since an attempt to transmit a copy via telefacsimile machine, as protester contends it did, does not satisfy requirement for actual receipt of protest by contracting agency within 1 day.
2. To be timely, protest must be filed with General Accounting Office within 10 working days of time protester knew or should have known of basis for protest.

DECISION

Adrian Supply Company requests reconsideration of our dismissal of its protest concerning request for proposals (RFP) No. F65501-87-R-0018 for transformers and fiberglass enclosures for use at Shemya Air Force Base, Alaska, issued by the Department of the Air Force. Western States Electric, Inc., also has protested the same acquisition. We previously dismissed Adrian's protest because Adrian failed to promptly furnish a copy of the protest to the contracting activity. We affirm the dismissal of Adrian's protest and dismiss as untimely Western's protest.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1987), explicitly require that a protester ensure that a copy of any protest filed with our Office is received by the contracting agency within 1 working day after the protest is filed. The protest was filed by Adrian with the General Accounting Office (GAO) on October 1, 1987. Adrian asserts that it transmitted a copy of the protest via telefacsimile machine to the contracting activity on the same day. On October 20, 18 calendar days and 11 working days after

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October 2, the date our regulations require that the contracting officer receive his copy of the protest, the Air Force advised us that the contracting officer in Alaska had not received a copy of the protest. As a result, we dismissed the protest.

The basis for the 1-day notice requirement is found in the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(b)(2)(A) (Supp. III 1985), which requires the contracting agency to file a written report with our Office within 25 working days after we notify the agency of the protest. Any delay in the receipt of a copy of the protest to the contracting agency not only hampers the agency's ability to meet the 25-day statutory deadline, but also frustrates our efforts to consider all objections to agency procurement actions in as timely a fashion as possible. Refac Electronics Corp.--Reconsideration, B-226034.2, Feb. 4, 1987, 87-1 CPD ¶ 117.

Adrian's actions did not satisfy the notice requirement in Section 21.1(d) of our Bid Protest Regulations. The fact that the protester may have sent a copy of the protest within the necessary period is not relevant since the regulatory requirement is for receipt by, rather than transmission to, the agency within 1 working day of filing. Canvas & Leather Bag Co., Inc., B-227889.2, July 24, 1987, 87-2 CPD ¶ 89. We therefore affirm our prior dismissal.

On January 26, 1988, Western protested the same acquisition and raised the same essential concern as Adrian. Specifically, Adrian and Western protest the award of the contract based upon their alleged failure to receive amendment No. 5 to the solicitation which provided a new closing date for the receipt of proposals.^{1/} Both argue that the agency's alleged failure to send them amendment No. 5 effectively prevented their participation in the procurement.

By way of background, the RFP required that the products have Rural Electric Association (REA) approval. Three amendments to the specifications were issued changing the required quantity and placement of items, adding certain

^{1/} Adrian also has protested that it believes its protest has been procedurally mishandled by the Air Force and our Office. Our review of the record does not support this contention. To the contrary, the record shows that the firm's initial protest was considered by the Air Force, but as indicated in this decision, the firm's further objections were not timely pursued and thus properly were not resolved on the merits by our Office.

Federal Acquisition Regulation (FAR Part 52) clauses, and postponing the closing date from April 6, to April 13. Adrian initially complained to the Air Force that the solicitation did not comply with REA requirements and that the specifications were restrictive since only one firm could supply the required fiberglass enclosures. By amendment No. 4, the agency deleted the solicitation's requirement for fiberglass transformer enclosures. Amendment No. 4 also delayed the closing date for receipt of proposals indefinitely because of a protest by Adrian against the solicitation's specifications, filed with GAO on April 13. On May 8, Adrian informed GAO that it had reviewed the corrective action taken by the agency in amendment No. 4 and withdrew its protest.

On May 13, the agency issued amendment No. 5 to the solicitation, setting May 29, as the new closing date for the receipt of proposals. The agency states that amendment No. 5 was sent to all the firms on the Bidder's Mailing List and that Adrian and Western were included on that list. Three proposals were received in response to the RFP. The agency held discussions and requested best and final offers. Best and final offers were submitted on June 23. Final evaluations continued until September 1. The record indicates that Adrian telephoned the contracting activity on September 3, to inquire about amendment No. 5 and was told it had been issued on May 13. At that time, Adrian informed the agency that it did not receive the amendment and a copy was then sent to Adrian. Award was made to Gee's Company on September 8. Notice of award was published in the Commerce Business Daily (CBD) on September 25.

Adrian's protest filed on October 1, which we dismissed, included a copy of this CBD notice. However, the protest letter did not mention that Adrian was aware on September 3, of the issuance of amendment No. 5 as the result of its telephone call to the agency on that day.

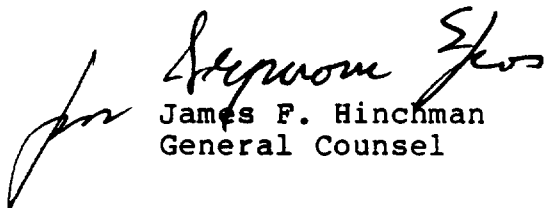
While we affirm our dismissal of Adrian's October 1 protest based upon Adrian's failure to furnish a copy of its protest to the contracting activity, as required by our Bid Protest Regulations, 4 C.F.R. § 21.1(d), the record shows that in any event, Adrian's protest against the agency's alleged failure to send it amendment No. 5 is untimely. All protests, other than alleged improprieties in a solicitation apparent prior to the closing date for the receipt of proposals, must be filed within 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). The record indicates that the protester knew of its failure to receive amendment No. 5 on September 3; however, Adrian did not file

its protest until October 1, more than 10 working days after it became aware of its basis of protest.

Western's protest that it did not receive amendment No. 5. is also untimely. Western asserts that its protest was timely filed since it did not learn until January 15, 1988, after Adrian contacted Western regarding Adrian's protest, that amendment No. 5 had been issued. Western states that it called the contracting activity in "April, May, June, July and August," to inquire about amendment No. 5, but was not informed that the amendment had been issued. We note, however, that Western provides no evidence to document these telephone communications. As stated above, to be timely, a protest must be received in our Office within 10 working days after the basis of protest was known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Further, the protester must have diligently pursued the information forming the basis for the protest. If the protester failed to do so within a reasonable time, we will dismiss the ultimately-filed protest as untimely. Electro-space Systems, Inc., B-227964, July 27, 1987, 87-2 CPD ¶ 94.

Here, the record shows that between August 1987 and January 1988--a period of 5 months--Western made no attempt to obtain from the agency information regarding this acquisition. Furthermore, a notice was published in the CBD on September 25, which announced that award had been made to Gee's Company under the protested solicitation. Thus, Western was on constructive notice of award and its basis of protest--that it had been excluded from participation in the procurement--on September 25. We conclude that this protest was not filed within 10 working days of when Western should have known the basis of its protest and therefore find it untimely.

We affirm our dismissal of Adrian's protest and dismiss as untimely Western's protest.


James F. Hinchman
General Counsel